

COMMISSION ON LEGAL COUNSEL FOR INDIGENTS POLICY REGARDING FAMILY AND MEDICAL LEAVE

The State of North Dakota and its agency, the Commission on Legal Counsel, are subject to the federal Family and Medical Leave Act of 1993 (FMLA). This act requires employers subject to the act to provide eligible employees with up to twelve weeks of unpaid leave during a twelve month period for certain qualifying reasons.

The Commission is also subject to the North Dakota Family Leave Act of 1989 (NDCC Ch. 54-52.4). This act provides eligible employees with up to twelve work weeks of unpaid leave for certain qualifying reasons.

The more generous benefits of either the FMLA or the ND Family Leave Act will generally apply.

Following are the essential benefits derived through a combination of the applicable laws as they apply to employees of the Commission:

- a. Eligibility: Employees are eligible if they have worked for the State of North Dakota for at least twelve months and have been employed an average of at least twenty hours per week as of the date leave is to commence.
- b. Reason(s) for taking leave: Leave will be provided for any of the following reasons:
 1. For the birth of the employee's child and to care for the employee's newborn;
 2. For the placement of a newly adopted or foster child and to care for a newly placed adopted or foster child;
 3. To care for an immediate family member (the employee's spouse, son, daughter, or parent) who has a serious health condition, as defined in 29 CFR § 825.800; or
 4. When the employee is unable to work due to the employee's own serious health condition, as defined in 29 CFR § 825.800.

- c. Notwithstanding any other opinions regarding the condition, the Commission will determine whether a condition qualifies as a serious health condition as defined in the FMLA. The Director or Deputy Director, using all available information, will make the final determination as to whether the reason for taking leave is qualifying as family medical leave.
 - 1. An employee may be required to supply a physician's verification of the condition, that the condition is serious, and that the employee will be unable to perform one or more essential functions of his or her job as a result of that condition. The verification may be required on the US Department of Labor form WH-380.
 - 2. An employee may be required to submit to an examination by a physician selected, and paid for, by the Commission.
- d. Length of leave which will be allowed: Up to twelve weeks for all authorized reasons, except that for a husband and wife who are both eligible for family and medical leave, and both employed by the State of North Dakota and any of its departments or agencies, the aggregate period of family and medical leave to which both are entitled is limited to twelve work weeks during any twelve month period for the birth and care of a newborn child, for placement of a child for adoption, or to care for an immediate family member with a serious health condition.
- e. Designation of paid leave: The Commission will require an employee to use accrued paid leave during an authorized FMLA leave of absence. Employees will first use any of the forty hours of 'family sick leave' (up to forty hours of an employee's accrued sick leave may be used per year to care for an immediate family member who is ill or to accompany an immediate family member to medical, dental or other

health examinations), and then use any accrued annual leave in conjunction with any authorized family and medical leave taken for any reason other than an employee's own serious health condition. Employees will first use any accrued sick leave and then use any accrued annual leave in conjunction with any authorized family and medical leave taken because of an employee's own serious health condition. Employees who have exhausted the applicable types of paid leave will be provided with unpaid leave to fulfill the remaining authorized period of family and medical leave.

- f. Job benefits and protection for non-key employees: Employees who are using the required paid leave will continue to receive or accrue benefits as normally provided employees on paid leave. Employees who are provided with unpaid leave during any authorized family and medical leave period will continue to have health insurance benefits paid by the Commission during the leave period. Employees in an unpaid leave status will not accrue annual or sick leave during the period of unpaid leave. Upon return from leave, an employee who is not designated as a 'key employee' (as defined in 29 CFR § 825.217) will be restored to his or her original position or an equivalent position with equivalent pay, benefits, and any other employment rights that existed at commencement of the leave or that may have accrued during the leave period. An employee designated as a 'key employee' may not be provided restoration rights upon return from leave, if restoration would cause 'substantial and grievous economic injury' to the agency.

Employees taking family and medical leave in either a paid or unpaid status may not perform work for another employer or as an independent contractor during the leave period without prior notification and approval of the Commission. Working for another employer or performing work as

an independent contractor other than under the conditions approved may be considered as negating the requirement to be absent from work and may cause immediate cancellation of family and medical leave status or disciplinary action up to and including termination of employment.

The Commission will continue to pay the employer's share of the health plan coverage during the period of family and medical leave. If an employee fails to return from a family and medical leave, the Commission may recoup the cost of health plan premiums for any period of the family and medical leave which was taken as unpaid leave.

Authorized leaves under this policy may be taken in intermittent or reduced work schedules, but in no less than one-hour increments.

An employee may be required to furnish periodic verbal or written reports to the Commission reporting the status of his or her condition, and the employee's intent to return to work.

The entitlement period, which is the twelve month period during which the maximum allowable weeks of leave may be taken, will be determined by a 'rolling' twelve month period, which will be measured backward from the date the employee uses any family and medical leave. Under this method, each time the employee takes family and medical leave, the remaining leave entitlement for the employee is the balance of the twelve weeks that has not been used during the immediately preceding twelve months.

An employee must apply for leave under this section in writing by completing a copy of the form entitled Employee Request for Family and Medical Leave. The application must be submitted to the Director or Deputy Director thirty days in advance of the requested leave starting date unless compelling circumstances substantiate a shorter notification as determined by the Director or Deputy Director. The failure of the employee to apply for family and medical leave does not preclude the Commission from determining that leave sought or taken is family and medical leave.

The Commission will provide a response in writing to an employee's application for leave by completing a copy of U.S. Department of Labor form WH-381 (or by other written means and containing all of the information required in that form). When leave is approved, the Commission will provide a statement that leave is designated as family and medical leave, that the employee is required to use accrued paid leave during the authorized family and medical leave of absence, a clear record of the start date, the last date of eligibility when family and medical leave designation must end, and a schedule of time at which the employee will contact the Commission, either verbally or in writing, as to the status of the conditions surrounding the reasons for leave.

Any time it appears to a Supervising Attorney that the leave requested by an employee is of a type which may be considered family and medical leave under this policy, the Supervising Attorney shall immediately contact the Director or Deputy Director and inform them of the situation. The Director or Deputy Director will determine whether the leave will be counted against an employee's total entitlement for family medical leave as allowed under this policy. When it is determined that the leave qualifies as family and medical leave, the employee will be so notified the form entitled Employee Leave to be Counted as Family and Medical Leave.

If a dispute arises as to the eligibility for leave under this policy, or as concerns the designation of paid leave as qualifying under this policy, or to determine appropriateness of notice of less than thirty days, an employee may submit additional information to the Director or Deputy Director for further consideration.